Bro-Tech Corp., t/a Purolite *and* Teamsters Local 107, a/w International Brotherhood of Teamsters, AFL–CIO. Case 4–CA–23458

November 18, 1999

SUPPLEMENTAL DECISION AND ORDER AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On December 16, 1994, following a Stipulated Election Agreement and subsequent resolution of objections to conduct affecting the results of election, filed by Respondent Purolite (the Employer), Teamsters Local 107, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Union) was certified as the exclusive representative of an appropriate unit of employees of the Employer.[1] Thereafter, on April 27, 1995, the National Labor Relations Board issued a Decision and Order[2] in which it found that the Employer had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the employees' certified representative and ordered it to bargain collectively with the Union. The Employer refused to comply with this Order and petitioned for review of the Board's decision in the United States Court of Appeals for the Third Circuit. It contended that the Board's certification was invalid because, inter alia, the Board had improperly overruled its objection based on the Union's having engaged in prohibited campaign practices under *Peerless Plywood Co.*, 107 NLRB 427 (1953), and *Alliance Ware*, 92 NLRB 55 (1950).[3] The General Counsel filed a cross-application for enforcement.

On January 31, 1997, the court denied the petition for enforcement, granted the petition for review, and remanded the proceeding to the Board for further proceedings.[4] The Board accepted the court's remand, and the parties were invited to submit statements of position with respect to the issues on remand. The Employer and the Union each filed statements of position as did the International Brotherhood of Teamsters (IBT) appearing as amicus curiae.[5] The Employer and the IBT also filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record and the position statements in light of the court's remand. For the reasons explained below, the Board has decided to vacate its earlier decisions, revoke the certification of representative, set aside the election, and remand the proceeding to the Regional Director for further appropriate action.[6]

Factual Background and Board Proceedings

In the spring of 1992, the Union filed a petition for an election among the full-time production, maintenance, warehouse, and laboratory employees at the Employer's chemical production facility. Upon the parties' stipulation, an election was held on July 17, 1992, in the Employer's ground floor conference room. Two voting sessions were scheduled: the first running from 7:45 until 9:45 a.m. and the second running from 3:30 until 4:30 p.m. The Board agent handling the election designated the corridor leading to the conference room and the immediate surrounding areas to be the "no electioneering" area.

Beginning at 7 a.m. on the day of the election and continuing until 4:30 p.m., a sound truck parked across the street from the Employer's facility broadcast tape-recorded music—two Teamsters songs interspersed with several popular songs unrelated to unions. The volume was sufficient that the music could be heard at various locations inside the plant, but not in the polling area itself.

At the hearing on objections, the Union submitted the cassette tape used for its broadcast. Employees testified that they heard "we are united, we are like unbeatable, we can do anything as long as we're together," "stand united, brothers and sisters, come together," and "we're brothers and sisters until the end."[7] Thus, the prounion message, if not the exact lyrics, of the Union's tape-recorded songs, "Proud to be a Teamster"[8] and "Teamsters Anthem"[9] was not lost on the employees.

[1] 315 NLRB 1014.

[2] 317 NLRB No. 20 (not reported in Board volumes).

[3] The Employer alleged in a separate objection that the Union's election observer engaged in improper electioneering. The court affirmed the Board's conclusion that substantial evidence supports overruling this objection. Thus, while this matter was raised before the court, it is no longer at issue.

[4] *NLRB v. Bro-Tech Corp.*, 105 F.3d 890 (3d Cir.).

[5] The Board denied the International Brotherhood of Teamsters' request to intervene, but granted it permission to participate in briefing.

[6] In view of our disposition of the issues in this case, the Employer's contention that an evidentiary hearing on its objection based on the "totality of the circumstances" of the election is moot.

[7] 315 NLRB at 1016.

[8] Throughout North America you see us on the job
from Atlanta to Calgary Vancouver to Cape Cod.
You can't tell us by our color, you can't tell us by our hat.
We're the backbone of the country, we take pride in being that.
We're brothers and we're sisters, working hard for what is fair.
You can always tell a Teamster by that certain pride he wears.
Meeting all the challenges, united we stand tall.
Proud to be a Teamster, that's why we'll never fall.
We are the North Americans, from sea to shining sea.
We backed our country in the fight, we earned our right to be.
When FDR put out the call, we kept him rolling through it all.
We are the workers who stand united, we're Teamsters one and all.
We're carving out a better life for our loved ones old and young.
We're giving them the melody, the song that's not been sung.
In a moment of reflection, I close my eyes and see the dreams our fathers had for us are now reality.

[9] Let's hail the Teamsters Union and sing of it with pride.
Remember Teamster members, your Union's by your side.
As long as we're together, our numbers will increase
and this will be our motto: prosperity and peace.
Now all for one and one for all is something you have heard,

The hearing officer concluded that the Union's prolonged broadcast of pro-Teamsters songs on election day violated the Board's rule, enunciated in *Peerless Plywood*, supra, prohibiting campaign speeches to captive audiences during the 24-hour period immediately preceding the election. She reasoned that the *Peerless* prohibition, as interpreted in *U.S. Gypsum Co*.[10] and *O'Brien Memorial*,[11] included within its proscription the use of sound trucks for communicating campaign speech when those communications extended through the time the election was in progress. She found that the music, unavoidably audible to employees at their work stations, constituted "speech" within the meaning of the proscription because the songs' lyrics were more than mere exhortations to vote, and included campaign phrases which amounted to last minute emotional appeals designed to sway voters.[12] Accordingly, she recommended sustaining the Employer's objection, and setting aside the election.[13]

The Board rejected the hearing officer's recommendation, finding that the songs emanating from the sound truck did not constitute "campaign speech" within the *Peerless Plywood* proscription. Although the Union's broadcasts could be heard at many employees' work stations throughout the day of the election, the Board concluded that the songs were mere musical appeals to vote, like those that, in *Crown Paper Board Co*.,[14] were found not to run afoul of the *Peerless Plywood* rule. Noting that the songs did not make campaign promises, did not refer in any way to the Employer, contained no references to wages, hours, or other collective-bargaining issues, and did not make a specific appeal to vote for the Teamsters, the Board concluded that the "broad and amorphous quality of the lyrics would not create the type of 'mass psychology' that concerned the Board in *Peerless Plywood*."[15]

Accordingly, the Board certified the Union and, as noted above, in a subsequent test of certification proceeding, found that the Employer violated its bargaining obligation under Section 8(a)(5) of the Act.

The Court's Opinion

In declining to enforce the Board's decision and remanding the case to the Board for further consideration, the court held that the Board erred when it rejected, without adequate explanation, the hearing officer's finding that the Union's sound truck broadcasts violated the *Peerless Plywood* rule. The court stated that the Board had failed either: (1) to explain how the absence of reference to specific campaign issues within the text of the musical broadcasts exempted such communication from the *Peerless Plywood* prohibition, or (2) to explain its creation of a new campaign speech theory to replace the *Peerless Plywood* standard. The court observed that the Board has not limited the rule's application strictly to massed assemblies of employees and had applied it to a sound truck broadcast in *U.S. Gypsum Co.*, supra, where the salient factor was "not the location of the speaker but whether the employees are exposed to the remarks."[16]

The court reiterated the hearing officer's findings that the Teamsters songs constituted "emotional appeals to sway votes" and as such were "no different than a speech," and noted that Board's the contrary conclusion was based on its peremptory and conclusory statement simply that "the broad and amorphous quality of the lyrics" was not encompassed by the concerns underlying the proscription in *Peerless Plywood*. Thus, in remanding the case, the court admonished the Board either to set forth the basis on which this case is distinguishable from *Peerless Plywood* or to enunciate clearly the parameters of a new standard.[17]

The Positions of the Parties

The Employer asserts that the court's opinion makes clear that the Union's sound truck broadcast falls within the ambit of "campaign speech" as contemplated by *Peerless Plywood* and that the Board should adhere to the long-established rule enunciated in that case.

The Union argues that the Board's underlying decision is directly analogous to the decision in *Crown Paper Board*, supra, in which "appeals to vote . . . with musical interludes" were found not to fall within the 24-hour rule restricting campaign speech, and it asserts that this reflects a proper construction of *Peerless Plywood*.

Amicus-IBT asserts that the instant case is distinguishable from, and therefore not controlled by, *Peerless Plywood*, in that employees were not addressed in a "massed assembly" and were not required to listen as members of a captive audience.

But when the Teamsters say it, the boys mean every word.
So hail the Teamsters Union and shout it loud and clear.
The Brotherhood of Teamsters will always be right here.

[10] 115 NLRB 734 (1956).

[11] 310 NLRB 943 (1993).

[12] *Great Atlantic & Pacific Tea Co.*, 111 NLRB 623 (1955), and *Crown Paper Board*, 158 NLRB 440 (1956).

[13] The hearing officer rejected the Employer's alternative theory that the musical message constituted improper last minute electioneering at or near the polls under *Alliance Ware*, supra. Absent evidence either that the music was audible in the polling area itself or that employees were waiting in line to vote in the adjacent corridor where music could be heard, she concluded that *Alliance Ware* was inapplicable.

[14] 158 NLRB 440 (1966).

[15] 315 NLRB at 1015. The Board also found that the Union's conduct was not objectionable under *Alliance Ware*.

[16] *U.S. Gypsum Co.*, supra at 735.

[17] While noting problems raised by both the hearing officer's and the Board's discussion of the Employer's alternative arguments under *Alliance Ware*, the court acknowledged that its disposition of the *Peerless Plywood* issue rendered it unnecessary to reach those arguments.

Analysis

I. THE *PEERLESS PLYWOOD* RULE

In *Peerless Plywood*, a union objected to an election on the basis that on the day before and within 24 hours of a scheduled election, employees were assembled on company time and property to listen to a campaign speech delivered by a high-level official of the employer, and, although requested to do so, the employer denied the union similar access to address employees. Then-prevailing Board law on the subject was set forth in *Bonwit Teller*, 96 NLRB 608 (1951). That case held that if an employer made a preelection address to its employees on companytime and premises, the employer could not lawfully deny a union's request for an opportunity to address employees in the same manner, i.e., in a gathering held on company premises. In *Livingston Shirt Corp.*, 107 NLRB 400 (1953), a companion case with *Peerless Plywood*, the Board reversed *Bonwit Teller* insofar as it required a company to provide a union access to its property in order to make a campaign speech in response to an employer's worktime, workplace preelection speech. Thus, *Livingston Shirt* held that denying a union such equal access would no longer violate Section 8(a)(1). In *Peerless Plywood*, however, the Board focused specifically on the *timing* of workplace preelection speeches, and held that "employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election."[18] Breach of this rule would constitute objectionable conduct sufficient to warrant setting aside the results of an election.[19]

The Board emphasized that its new rule was directed at parties' eleventh-hour campaign efforts only while employees were on companytime and not when employees were off the clock and free to choose whether or not to attend a meeting or listen to a party's appeal. Thus, employers and unions alike could continue to communicate with employees who were willing to discuss campaign issues individually, or to attend meetings, rallies, or other gatherings on or off company premises throughout this period, but they could not require employees to participate in last-day, worktime assemblies. The Board further explained that the dual objectives of its rules setting time and space limitations on campaign conduct were to keep elections free of undue advantage for any party and to ensure that employees could exercise their right to vote in an atmosphere conducive to freedom of choice.

In *U.S. Gypsum Co*., the Board applied the principles of *Peerless Plywood* to a sound truck broadcast. In that case, within 24 hours before a scheduled election and continuing for a period of 7-1/2 hours, a union broadcast campaign speeches and other material from a sound truck parked on the street across from the employer's plant. The volume was sufficient to be audible inside parts of the plant. It was determined that approximately 50 of the 424 eligible employees heard, or were in a position to hear, the sound truck broadcast at their work stations, while another 215 employees were located in areas beyond the reach of the sound. The Regional Director determined that the union did not breach the *Peerless Plywood* proscription because employees were not "summoned" to hear the speeches nor were they "under the control of the speaker and compelled to listen."[20] Instead, he concluded that "except to the extent that they could not avoid hearing the sound truck," such attention was merely "incidental while performing their duties."[21]

The Board disagreed. Recognizing that the usual *Peerless Plywood* situation involved a speech delivered face-to-face, to a group or massed assembly of employees gathered together for the specific purpose of listening to the remarks, the Board reasoned that the critical element was not the location of the speaker, but rather "whether the employees are exposed to his remarks."[22] Although the employees were not gathered together for the sole purpose of listening to the speech, they were nonetheless working with or near each other at their assigned worksites while the union directed its day-long campaign message to them. Thus, the Board concluded that "the considerations operative in establishing the *Peerless Plywood* rule are present in substance, albeit not in form"[23] to compel the same result. Accordingly, the Board set aside the results of the election.

II. APPLICATION TO THE INSTANT CASE

As the above description of the *Peerless Plywood* doctrine demonstrates, the Board's goal is to keep voters as free of uninvited mass messages as possible during the period just prior to the conduct of the election. Applying this principle squarely to the facts of this case on remand, we conclude that the Board's earlier holding cannot stand and find that the Union's use of the sound truck interfered with the conduct of a fair election. As stated above, the Union's sound truck broadcast tape-recorded music, including pro-Teamsters songs, for 9-1/2 hours during the day of the election—beginning 45 minutes prior to the opening of the polls and ending at the close of the polling period. The sound was clearly audible to anyone entering the Employer's premises and carried into a number of employee work stations throughout the

[18] *Peerless Plywood*, supra at 429.

[19] The Board compared this rule imposing *time* limitations on campaign speech as "akin to, and no more than an extension of," its existing rule imposing *space* limitations, set forth in *Alliance Ware*, supra, whereby parties are forbidden to engage in electioneering at or near the polling place.

[20] *U.S. Gypsum*, supra at 734.

[21] Id. at 734–735.

[22] Id. at 735.

[23] Ibid.

facility. Employees testified not only that they heard the music, but, more importantly, that they heard its message encouraging their support for the Union.

We find that these facts establish that the Union's conduct falls within the proscription of *Peerless Plywood*. This was not an effort by a party to engage in voluntary discussions with employees about the merits of union representation. Instead, just prior to casting their votes, these employees—whether on their way in to work, on the job, and/or while leaving the plant—were exposed to the Union's campaign broadcast whether they wished to hear it or not. As the Board reasoned in *U.S. Gypsum*, employees thus unwillingly exposed to a campaign message became a captive audience within the meaning of *Peerless Plywood*.

In addition, employee testimony establishes that those who heard the broadcast clearly understood the persuasive character of the message being sent, i.e., that the Teamsters Union was the correct choice in the election. Thus, contrary to the reasoning in the Board's original representation case decision (and in deference to the court's remand), we find that the partisan content of the songs is sufficient to place it within the realm of campaign speech under *Peerless Plywood*. Whether in the form of lyrics to a pro-Teamsters song, a nonmusical partisan oration, or a dry recitation encouraging support for a particular electoral choice, we find that they all fall within the broad rubric of campaign speech within the proscription of *Peerless Plywood*.[24]

Accordingly, we vacate the Board's prior Decision and Order finding that the Employer violated Section 8(a)(5) and (1) by refusing to bargain with the Union and our prior supplemental Decision and Certification of Representative overruling the Employer's Objection 4(a). We find that the Union's election day sound truck broadcasts violate the standards set forth in *Peerless Plywood* prohibiting campaign speeches to a massed assembly of employees within 24 hours of an election, we set aside the election, and we direct a second election.

ORDER

It is ordered that the election held July 17, 1992, is set aside and that this proceeding is remanded to the Regional Director for Region 4 for the purpose of conducting a new election.

IT IS FURTHER ORDERED that the Board's decisions, 315 NLRB 1014 (1994), and 317 NLRB No. 20 (1995) (not reported in Board volumes), are vacated.

[Direction of Second Election omitted from publication.]

[24] To the extent *Crown Paper Board*, supra, is to the contrary, it is overruled.